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Negligence: An introduction to Causes of Action - by Michael Brangwynne

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This is the fourth article in a series on the circumstances that can give rise to a civil lawsuit. Earlier articles in the series can be found on Fletcher Tilton's website under Articles and on the NEREJ website.

Negligence Generally

In the last two installments of this series, we saw the importance of incorporating and obtaining appropriate business liability insurance to protect both personal and corporate assets from exposure to liability based on the careless acts of employees. You may be wondering what must be proven by an aggrieved party to recover damages for such careless acts. In other words, what are the elements that make up the cause of action?

Negligence is a broad and long-recognized cause of action under which an aggrieved party (the plaintiff) may recover damages if he can prove that (1) the defendant owed him a duty of care, (2) the defendant breached that duty by failing to act in a reasonable, careful manner, (3) the defendant's violation of his duty of care caused the plaintiff harm, and (4) damages were sustained.

As we saw earlier, based on the principle of respondeat superior, if negligence is proven against an employee and the employee was acting within his scope of employment, then both the employee and his corporate employer will be held liable.

As with most other causes of action, there are affirmative defenses to a claim for negligence. One of the most common is the defense of comparative negligence. This occurs when the plaintiff–the individual who has suffered harm and has made a claim against the defendant–was also acting in a careless manner that contributed to his injury. Under Massachusetts law, the plaintiff's total recovery is reduced in proportion to his share of fault. If the plaintiff is found to be 51% or more responsible for his injuries, he is completely barred from recovery.

By way of example, if Mr. Pedestrian suffers injuries while crossing the street when he is struck by a delivery van operated by Mr. Driver, who is exceeding the posted speed limit by 15 mph, Pedestrian could file a lawsuit against Driver for negligence and could also name Driver's employer, Delivery Corp., as a defendant if Driver was operating the delivery van within the scope of his employment.

The defendants (Driver and Delivery Corp.) might assert, as an affirmative defense, that Pedestrian did not look before crossing the road and was listening to his headphones on full volume so did not hear Driver approaching. If a jury found that Driver was negligent, but that Pedestrian was 25% at fault for his own injuries, Pedestrian's total damages recovery against the defendants would be reduced by 25%.

If Pedestrian does establish that Driver was acting negligently and that he was acting within the scope of his employment, then Driver and Delivery Corp. would be jointly and severally liable. Pedestrian will be paid his total damages award only once, but joint and several liability means that Pedestrian can seek payment of his damages from Driver, Delivery Corp., or both. Typically, the employer would be the party with "deeper pockets"–not to mention the party more likely to have a general liability insurance policy–and therefore Pedestrian is much more likely to seek payment from Delivery Corp.

Negligence is a common cause of action asserted against individuals and businesses by third parties. By exercising proper care in our actions, and strongly encouraging the same in our employees, we can further mitigate against the risk of exposure to liability.

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